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Supreme Court of the United States

October Term, 1958

No. 878

MICHAEL BERMAN, successor to LEWIS H. SAPER, as Trustee in Bankruptcy of the Estate of Riverside Iron and Steel Corporation, Bankrupt,

Plaintiff-Petitioner,

against

HEWITT S. WEST, JR., and THE FIRST NATIONAL BANK OF NEVADA, Reno, Nevada, Las Vegas Branch, as Executors of the Estate of Hewitt S. West, Deceased, and W. LUNSFORD LONG,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. ARNOLD ROSS,
Counsel for Petitioner.

I. ARNOLD ROSS,
STANLEY J. MAYER,
of Counsel.

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MICHAEL BERMAN, successor to LEWIS H. SAPER, as Trustee in Bankruptcy of the Estate of Riverside Iron and Steel Corporation, Bankrupt;

Plaintiff-Petitioner,

against

HEWITT S. WEST, JR., and THE FIRST NATIONAL BANK OF NEVADA, Reno, Nevada, Las Vegas Branch, as Executors of the Estate of Hewitt S. West, Deceased, and W. LUNSFORD LONG,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices in the Supreme Court of the United States:

Petitioner respectfully prays for a writ of certiorari to review a decree and judgment of the United States Court of Appeals, for the Second Circuit (Vol. IV, pp. 55a to 70a),* 263 F. 2d 422, which affirmed a judgment of the United States District Court, for the Southern District of New York, wherein the District Court dismissed petitioner's complaint on the merits. The unreported decision of the District Court is in the record as Vol. I, pp. 37-265.

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*Reference is made to pages in the Record. Italics supplied unless otherwise noted.

Basis of Jurisdiction

Jurisdiction of this Court is invoked by reason of the following:

The decree and judgment of the Court of Appeals is dated and was entered on February 4, 1959. The order denying petitioner's petition for a rehearing was dated and entered on March 11, 1959. This Court has jurisdiction to entertain the petition by reason of § 1254(1) of Title 28, United States Code.

Summary and Statement of the Matters Involved

The result of the decisions of the lower courts is to permit two of the three entrepreneurs, or risk takers of an incorporated venture, to retain approximately $159,000, representing two-thirds (2/3rds) of the proceeds of the sale by the corporation of that venture (the corporation's only asset), while the general creditors of the corporation are unpaid.

The entire record is based on depositions and exhibits thus permitting the appellate courts to determine whether the facts and conclusions of law as found are warranted from the evidence.

Harlan H. Bradt, Hewitt S. West, and W. Lunsford Long, hereinafter referred to as "Bradt", "West", and "Long", respectively, had been interested jointly in mining projects. Bradt, a mining engineer, in 1940 acquired a Lease and Sale Lease Agreement from Southern Pacific Land Company, hereinafter referred to as "Southern Pacific" to operate the Iron Chief Mining Property at Riverside, California. He also acquired an option to purchase the capital stock of Western Minerals Exploration Co., which controlled extensive manganese mining claims in Nevada. By November of 1940 he succeeded in interesting West and Long to join him in both ventures. Upon the latters' in-

sistence that the Option and Lease and Sale Agreement be transferred to a corporation to protect them from personal obligations and that their rights be reduced to writing, Bradt, on March 1, 1941, incorporated Riverside Iron and Steel Corporation, hereinafter referred to as "Riverside" and "bankrupt", and Clark-Mead Corporation, hereinafter referred to as "Clark-Mead", under the laws of Nevada, and transferred the iron mine interest to Riverside and the manganese interest to Clark-Mead.

The three individuals on March 14, 1941, thereupon entered into a letter agreement (Vol. I, pp. 16-21) recognizing that the rights were owned by the corporations aforementioned, permitting Bradt to operate said corporations and to be the owner of record of all of the outstanding capital stock of each for financing purposes, and setting forth their personal rights. This litigation deals with the iron mine interest and Riverside, and petitioner is the trustee in bankruptcy of Riverside.

Riverside's inability to finance the Iron Chief operation resulted in its assigning the Lease and Sale Agreement to E. T. Foley with Riverside retaining a 25% interest in any profit from its sale and operations. Foley, in 1946, sold the Lease and Sale Agreement to Kaiser Company, Inc., for $1,132,811.35, and Riverside's share thereof was $298,418.82. Riverside and Bradt objected because the sale was for a small fraction of what Bradt believed to be its value. He accused Kaiser and Foley of conspiring to dispose of this asset for an inadequate consideration. Vinnell and Dunton had worked the mine for both Riverside and Foley. They had a claim against the bankrupt and Foley for their services. West and Long, the defendants-respondents informed Foley of their interest. Foley thereupon brought an action for a declaratory judgment in the Superior Court of the State of California, Los Angeles County, on October 25, 1946, to determine the rights of all parties, joining Riverside, Bradt, West and

Long. Vinnell and Dunton asked adjudication of their claim. West and Long asserted their claim under the March 14, 1941, agreement.

The Court, there found that it had, in effect, four different actions: (1) Foley's action for a declaratory judgment, (2) the cross-claim of Riverside of the alleged conspiracy, (3) the claim of Vinnell and Dunton, and (4) the claims of West and Long. It held three separate trials. The first combined the first two claims. In that phase the Court found that the sale was proper; that there was no conspiracy; and held further:

> " • • • that plaintiff E. T. Foley is holding in trust $273,418.82 payable to defendant Riverside Iron and Steel Corporation subject to the other claims of this action". (Exh. A2, pp. 430-431, Vol. I, p. 68.)

The second phase resulted in a judgment in favor of Vinnell and Dunton against the bankrupt and Foley. In the final phase the Court divided the money payable to Riverside among Bradt, West and Long. This latter phase was tried without notice to Riverside's general creditors, and no proceeding had been instituted to determine Riverside's liabilities. The judgment entered in said action on July 30, 1948, required Foley to deposit the money he admitted holding for Riverside with the Clerk of the Court and prohibited issuance of execution until the judgment became final (Vol. II, p. 536). Riverside and Bradt appealed to the District Court of Appeals. The judgment was affirmed. Riverside and Bradt then sought to appeal further to the Supreme Court of California. Their petition therefor was denied on November 16, 1950. The remittitur on the appeal was filed with the Superior Court on November 20, 1950. West and Long received from the Clerk of the Superior Court on November 21, 1950, $76,898.48 and $81,898.48, respectively.

Riverside filed a voluntary petition in bankruptcy with the United States District Court for the Southern District

of New York on March 14, 1951. Bradt's interest of $82,619.69 was attached by Riverside's and some of Bradt's creditors, and was distributed through another action in California to certain secured creditors of the bankrupt. (Bradt's personal creditors received nothing.) The trustee recovered only $11,125 for the general creditors. Thus, out of Riverside's sole asset—its share in the profit from Foley's sale of the Iron Chief Lease and Sale Agreement—having a realized worth of almost $300,000, the general creditors (represented by petitioner) received only $11,125 and West and Long, the defendants-respondents, received almost $159,000.

This action by Riverside's trustee seeks to recover the sums received by West and Long under §§ 60(b), 67(d) and 70(e) of the Bankruptcy Act and the California statutes and laws relating to fraudulent conveyances and distribution of funds of a corporation before satisfying the claims of its creditors. Affirmative defenses of *res judicata* and collateral estoppel by judgment were held inapplicable by both Judge Edward Weinfeld on defendants' motion for summary judgment (121 F. Supp. 65 [1954]), and Judge William B. Herlands, the Trial Judge, both of whom ruled that the right to the money by the bankrupt and its general creditors as against Bradt, West and Long had not been litigated or adjudicated in the California action. That holding was not disturbed by the Court of Appeals.

However, the District Court ruled that the schedules in bankruptcy, the filed sworn proofs of claims of Riverside's creditors, and eight of the nine judgments against the bankrupt and the complaints on which they were based, all of which were received in evidence without objection, were not competent proof of Riverside's obligations and insolvency. The Court of Appeals upheld this ruling. Excluding Bradt's personal claim, the schedules showed obligations of $172,306.50, the proof of debts, $117,792.23, and the eight judgments totalled $124,792.48. The effect of the decisions of the District Court and the Court of Appeals

is to require a trustee in bankruptcy to prove the validity and extent of every creditor's claim to establish insolvency in an action to recover a preference or fraudulent transfer.

The California statutes provide that an action is deemed pending until the judgment of the trial court becomes final after completion of all appeals, and that the property affected does not change ownership until a final determination, or where property is in *custodia legis*. Thus November 20, 1950 was the date when the defendants-respondents first obtained enforceable rights to the money. Notwithstanding, the Court of Appeals affirmed the District Court ruling that the pivotal date was August 2, 1948, when Foley deposited the money with the Clerk, and that the time limitations provided under §§ 60 and 67(d) had expired by the date of bankruptcy.

Reasons for the Allowance of the Writ—Importance of the Questions Presented

(a) In holding that the word "transfer" in §§ 67(d) and 70(e) of the Bankruptcy Act refers only to voluntary acts of the bankrupt, the Court of Appeals for the Second Circuit is in conflict with the 9th and 8th Circuits which have held that the definition of "transfer" in § 1(30) of that Act, including involuntary methods, applies to §§ 67(d) and 70(e). This Court should resolve this conflict and decide this issue.

(b) In holding that judgments, proofs of claims, and bankruptcy schedules are incompetent evidence of insolvency, despite their introduction into evidence by both sides, the Court of Appeals has imposed an impossible burden of proof upon a trustee in bankruptcy seeking to recover for preferential or fraudulent transfers, and has decided contrary to the reasoning of this Court in *Diaz* v. *U. S.*, 223 U. S. 442 (1902). This Court should decide this issue.

(c) In holding that the transfer of the money to defendants-respondents occurred in 1948, when the money was placed in *custodia legis* pending completion of appeals to the higher courts of California, and not in 1950, when the appeals were completed and the money was actually turned over by the Clerk of the Court to defendants-respondents, the Court of Appeals failed to give effect to the California statutes and decisions thereunder holding the contrary. This Court should review this determination.

(d) In stating that two-thirds of the proceeds of the sale of the bankrupt's sole asset belonged to the defendants-respondents, the entrepreneurs, the Court of Appeals disagreed with the District Court and has approved of a method for permitting the promoters of a corporate venture to siphon off profits before payment to corporate creditors. This Court should review this determination and correct this result.

The Questions Presented for Review

(a) Did the filing of the remittitur by the California court and the transfer of the money by the Clerk of the Court to the defendants-respondents constitute a transfer within the meaning of §§ 67(d) and 70(e) of the Bankruptcy Act.

(b) Did the judgments, proofs of claims and schedules in bankruptcy constitute competent evidence of the liabilities of the bankrupt at the time of the transfer and at the time of the filing of the petition in bankruptcy.

(c) Did the knowledge by defenants-respondents of the facts concerning the bankrupt's liabilities at the time of the transfer constitute notice or reasonable cause to believe that the bankrupt was or will be made insolvent by such transfer.

(d) Did the California statutes and decisions require the conclusion that the transfer took place in November

of 1950, when the California appellate processes had been completed and the money was paid over to the defendants-respondents, rather than in 1948, when the money was placed in *custodia legis*.

(e) Should the defendants-respondents as promoters of the corporate venture have been permitted to receive the proceeds of the sale of the corporation's sole asset before payment to general creditors, or should the distribution have been treated in the nature of a liquidating dividend or a fund to be held in trust for general creditors.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a transcript of the record and the proceedings of said United States Court of Appeals for the Second Circuit, had in this case, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the decree and judgment herein of the said United States Court of Appeals for the Second Circuit be reviewed by this Court; and for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

I. ARNOLD ROSS,
Counsel for Petitioner.

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Defendants-Respondents.

PETITIONER'S BRIEF

POINT I

The Court of Appeals erred in holding that the word "transfer" in § 67(d) and § 70(e) of the Bankruptcy Act refers only to voluntary acts; this holding conflicts with the decisions in the Ninth and Eighth Circuits.

Two of the causes of action were to recover for a fraudulent transfer under § 67(d)(2) of the Bankruptcy Act, and for a fraudulent conveyance under § 3439.04 of the California Civil Code and § 70(e) of the Bankruptcy Act. The word "transfer" is used in both bankruptcy sections.

The Court of Appeals' affirmance of the definition given that term by the District Court does violence to the improvements effected by the Chandler Act.

Congress, after many years of study through committees interested in the improvement of that Act, adopted the Chandler Act in 1938 (H. R. 8046, 75th Congress, 1st Session). It expanded the definition of "transfer", which it adopted as Clause 30 to § 1, as follows:

> " 'Transfer' shall include the sale and every other and different mode, *direct or indirect*, of disposing of or of parting with *property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein*, absolutely or conditionally, *voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment*, payment, pledge, mortgage, *lien, encumbrance*, gift, security or otherwise."

In House Report #1049 dealing with the bill which became law, the House Judiciary Committee said:

> "Transfer."—Clause (30): "The reasons for the changes in this definition are that section 60, dealing with preferences, speaks of transfers and judgments; section 67, dealing with liens and fraudulent transfers speaks of liens, conveyances, transfers, assignments, encumbrances, levies, judgments, and attachments; and section 70(e), dealing with the avoidance by the trustee of transfers uses merely the term 'transfer'. In order to achieve uniformity, the revised terminology of these sections, wherever possible, is restricted to the latter term. It therefore becomes necessary to expand the phraseology of this definition, in order to make certain that it shall include the full scope of all of the terms presently employed in the sections cited."

Jacob I. Weinstein, Esq., one of the conferees who helped write the Chandler Act, said in his book, "Bankruptcy Act of 1938", as to the definition of "transfer", on page 7:

> "This definition '25' of the old Act has been retained in the Chandler Act, but has been amplified to make it clear that *the term 'transfer'* as used in the Act, *covers every conceivable form or method of transfer of property, interest therein or the posses-*

sion thereof. By virtue of this expanded definition the Chandler Act has been enabled to substitute the term for equivalent expressions in the old Act, particularly in sects. 60, 67, and 70."

Collier on Bankruptcy, 14th Ed. states in Volume 1, § 1.30 on pages 130.10 and 130.11 as to § 1(30) of the Bankruptcy Act:

> "* * *. *It is immaterial whether the transfer is accomplished voluntarily or involuntarily.* * * *. The definition is of particular importance in connection with §§ * * * 60, * * * 67(d) * * * 70(e) and should be borne in mind by the practitioner when dealing with the situations envisaged by the enumerated sections;"

and on page 130.12:

> "*A transfer is present* not only where the debtor voluntarily confesses or authorizes the confession of a judgment resulting in levy and sale or induces the appointment of a receiver but also *where a lien is obtained by a judicial proceedings,* without active participation or *even over the resistance of a debtor. Liens of this type include judgment liens* as well as attachment, garnishment, and execution liens * * *"

In discussing "transfer" in connection with § 67(d) created by the Chandler Act, Collier on Bankruptcy, states on page 324 of Volume IV:

> "'Transfer' is generously defined in § 1(30) for the purpose of § 67d, as well as for the Act generally * * *."

Remington on Bankruptcy, in discussing fraudulent transfers and obligations, states in Volume 4 (1957 Edition) under § 1642.1 on page 121 as to what constitutes "transfers" and obligations:

> "The § 1(30) definition of 'transfer' seems to be regarded as the test of whether an act or transaction is to be considered as constituting a 'transfer' under § 67(d) * * *".

and on page 122:

> "* * *. The Bankruptcy Act definition of 'transfer', however, very clearly and specifically includes

> involuntary transfers, and it is *highly doubtful that in the absence of anything to the contrary in § 67(d), the application thereof can be legitimately confined to only such transfers as are freely and voluntarily made.*"

Nevertheless, despite all of the above, the District Court stated as to the meaning of the word "transfer":

> *"This Court is of the opinion that the 67(d)(2) phrase 'transfer made * * * by a debtor' was not intended to broaden the concept of 'conveyance' as used in Section 4 of the Uniform Act. * * *"* (Vol. I, p. 222.)

The Uniform Code limits "conveyance" to:

> "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance." (Vol. I, p. 242.)

The District Court's construction of "transfer" disregards the text of the definition which states that it applies to involuntary as well as voluntary actions and to judicial proceedings.

The Court of Appeals, in affirming the District Court's determination that there was no transfer within the meaning of §70(e) in dismissing the second cause of action, gave an interpretation to "transfer" contrary to that given it by the 9th Circuit. The "transfer" or "conveyance" in the instant case took place in California. The second cause of action sought relief under §§ 70(c) and (e) of the Bankruptcy Act and § 3439 of the California Civil Code (the California Fraudulent Conveyance Act). § 70(e)(1) makes a transfer, which is fraudulent or voidable by any creditor under any Federal or State law, null and void as against the trustee of such debtor. California's § 3439.04 uses the word "conveyance" and the latter is included in the definition of "transfer" in § 1(30).

The Federal courts, in passing upon fraudulent conveyance actions under § 70(e), have defined "conveyance" as

broadly as the definition of "transfer" in § 1(30), and have not restricted it to voluntary acts as has been done here by the District Court and the Court of Appeals.

In *Eisenrod* v. *Utley*, 211 F. 2d 678, the United States Court of Appeals for the 9th Circuit, in 1954, affirmed a judgment of a District Court which set aside a fraudulent conveyance. The California Fraudulent Conveyance Act, the very Act upon which the Second Cause of Action is based, was relied upon. The defendant claimed that the bankrupt did not make the transfer. The appellate court on pages 680 and 681, acted upon the latest definition of "transfer", and disposed of the contention that *Park* v. *Cameron*, 237 U. S. 616 (1915) required that the transfer be the voluntary act of the bankrupt. It said on page 680:

> "When Park v. Cameron was decided, the language of § 70 sub. e was: The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided * * *."

and on pages 680 and 681:

> "Also in the 1938 Act the definition of 'transfer' in § 1(30) was amended to make it clear that 'transfer' included every 'parting with property' or with an interest therein or possession therof, 'voluntarily or involuntarily'. It appears to us that these 1938 amendments operated to bring within the orbit of § 70 sub. e the very thing which transpired here. Whether under the doctrine of Park v. Cameron it could be said that the transfer here was one 'by' the bankrupt is of no consequence * * *. It was a 'transfer' whether the property was parted with 'voluntarily or involuntarily' for such is now the definition of the term".

A similar interpretation was given to the word "conveyance" and "transfer" in *Warner* v. *Dworsky*, 194 F. 2d 277 (1952). A trustee in bankruptcy sought in that action to enforce the Minnesota Fraudulent Conveyance Act. The District Court dismissed the action. The defendant had maintained that the bankrupt had not made

the transfer. The United States Court of Appeals for the Eighth Circuit in reversing the lower court said on pages 280-281:

> "The construction we have placed upon § 70 (sub. e) seems to be in harmony with the definition of transfer contained in § 1(30) of the Bankruptcy Act • • • and also with § 70 sub. 2 Clause (8) • • • ".

The Bankruptcy Act makes every type of disposition of a bankrupt's property, a transfer. Even "conveyance" comes within the definition of § 1(30).

The payment by the Clerk of the California court to the defendants-respondents of the $159,000 on November 21, 1950, under the remittitur filed November 20, 1950, was a "transfer" and a "conveyance" of the bankrupt's assets—two-thirds (⅔rds) of the proceeds of the sale of its sole asset. This was within the meaning of the word "transfer" in §§ 67d(2) and 70(e) and the Courts below erred in holding otherwise. This Court should resolve the conflict between the Circuits, and should determine whether the definition of transfer in § 1(30) should apply to § 67(d) and § 70(e) as well as to § 60.

POINT II

The Court of Appeals erred in deciding that the bankruptcy schedules, the proofs of claims and the judgments were inadmissible evidence, and, therefore, that the trustee had not proved insolvency.

The District Court had received in evidence the bankrupt's schedules in bankruptcy (Vol. II, pp. 412-423), proofs of debt of Riverside's creditors (Vol. II, pp. 424-481), eight judgment rolls (Vol. II, pp. 327-408) and a certified copy of another judgment. (Vol. II, pp. 409-411). The schedules in bankruptcy showed that the bankrupt had one asset, $81,940.34, which was held by the Clerk of the California Superior Court subject to claims of secured creditors, and

liabilities of $230,306.50. The 18 sworn claims of creditors filed with the Referee in Bankruptcy stated that the bankrupt owed them $163,412.08. The eight judgment rolls showed liabilities of $124,792.48. The judgment rolls were received in evidence *without objection* as a result of a pre-trial stipulation and order (Vol. II, pp. 269-273). *Both sides* offered in evidence the schedules in bankruptcy and the proofs of claims (Vol. III, pp. 704, 708, 898). The District Court, however, erroneously stated that the defendants had objected to their receipt (Vol. I, p. 236) and then ruled that all this evidence was hearsay and not binding on the defendants. The Court of Appeals erroneously relied on the District Court's representation of the record, and failed to note the references by petitioner to the parts of the record where all of the material aforementioned was received in evidence.

Petitioner contends that the evidence was proper and admissible *prima facie* proof of the liabilities, and that in the absence of proof overcoming the evidence as to any particular claim, must be deemed to have established the bankrupt's liability in an action to recover a preference and fraudulent transfer. To require a trustee in bankruptcy to prove in plenary fashion the validity and extent of every creditor's claim would destroy in effect those provisions of the Bankruptcy Act intended to protect general creditors against preferences and fraudulent transfers. The trustee subsequently recovered only $11,125 of the $81,940.34 for Riverside's general creditors.

The decisions of the District Court and Court of Appeals that the evidence was incompetent are in conflict with the statement by this Court in *Diaz* v. *United States*, 223 U. S. 442 (1912). This Court said on page 450:

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible."

Both sides offered the bankrupt's schedules in bankruptcy in evidence (Vol. III, pp. 704, 898).

Moreover the cases are uniform in holding that a trustee is not required to prove the validity of each claim against the bankrupt to establish its insolvency in actions to set aside and recover for preferential and fraudulent transfers and fraudulent conveyances, and that the schedules in bankruptcy may be used to establish insolvency at the time of the transfer and conveyance.

Ernst, et al. v. *Mechanics & Metals Nat. Bank of New York,* 200 F. 295, 297, aff'd in 201 F. 664 and in 231 U. S. 60 (1913);

Fifth National Bank v. *Lyttle,* 250 Fed. 361 (C. C. A. 2, 1918) cert. den. 247 U. S. 506, which affirmed *Lyttle* v. *Fifth National Bank,* 39 Am. B. R. 690;

Rosenberg v. *Semple,* 257 F. 72, 73 (C. C. A. 3rd, 1919);

In re Mandel, 127 F. 863 (1903), aff'd 135 F. 1021;

In re Iron Clad Mfg. Co., 1[illegible]. 280, 282 (C. C. A. 2d, 1912);

In re Docker-Foster Co., 123 F. 190, 191 (E. D. Pa., 1903).

In *In re Docker-Foster Co., supra,* the Court said, on page 191:

> "The books of a bankrupt are evidence on the question of insolvency within four months within the date of filing the petition. They are not conclusive upon the subject, for they may be incomplete, incorrect, or fraudulent, but ordinarily they are important evidence and entitled to much weight. *The schedules* and the inventory and appraisement *are also evidence upon the same question.*"

In *Lyttle* v. *Fifth National Bank, supra,* a trustee in bankruptcy sought to recover a preferential payment made within four months. The Referee in Bankruptcy said as to insolvency, on page 693:

> "Upon this question it is proper to consider the condition of the bankrupt's estate, as disclosed by the schedules in bankruptcy."

Judge Learned Hand, in *Ernst* v. *Mechanics & Metals National Bank, supra*, stated that the common law principle of proving every item of liability and asset was not applicable for proof of insolvency under the Bankruptcy Act.

The defendants and the District Court attacked the judgments on various grounds (Vol. I, pp. 234, 238-239, 241). They may not be attacked collaterally. The Full Faith and Credit Clause of the United States Constitution has established throughout the Federal System the common law principle that a litigation once pursued to judgment shall be conclusive of the rights of the parties in every other court.

Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430, 439 (1943);
Riley v. *New York Trust Co.*, 315 U. S. 343, 348, 349 (1942).

The complaints had been received in evidence without objection. They are *prima facie* proof of the allegations they contain and are not subject to collateral attack. In only one case, and that related to McGuire's interest in the Clark judgment, did the respondents question the validity of the claims. There is no justification for the Court disregarding the allegations in the other complaints to establish the date when the obligation arose.

Petitioner contends that the key date for the transfer and conveyance was November 20, 1950. The bankrupt owed on this day $128,502.13 as evidenced by the judgments, $54,202.21 as evidenced by filed sworn proofs of debts other than judgments, and $46,000 listed in Riverside's schedules not included in the prior categories. Riverside owed that day $229,164.34.

As against the above, the amount left to Riverside for all of its creditors (secured and general) from the sale of its sole asset was only $82,619.69 and the amount

left to the trustee after the payment of secured creditors was but $11,125 of that sum. On the other hand defendants-respondents received approximately $159,000 of the proceeds of the sale of that sole asset of Riverside.

There is a wealth of evidence in the record that the respondents knew of these facts when they received the money, and thus had knowledge of Riverside's insolvency.

Riverside was insolvent at all times significant for the enforcement of the rights asserted in the various causes of action. Petitioner, as trustee in bankruptcy, established this insolvency in the only practical way. The decisions of the Courts below have created a burden of proof which, in effect, would make completely impractical the maintenance by any trustee of actions to set aside preferences and fraudulent transfers. This ruling should be reversed by this Court.

POINT III

The Court of Appeals erred in failing to fix November 20, 1950, as the date on which the transfer and conveyance occurred. There is no justification in law for its determination that such date was August 2, 1948.

One of the principal questions which the lower courts had to determine was the date when the transfer or conveyance took place. The date is material to start running the appropriate statute of limitations and to establish insolvency thereon.

The applicable date to an action under § 67(d), the first cause of action, is fixed by § 67(d)(5) of the Bankruptcy Act. That makes it the date when the transfer became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired rights in the property so transferred, superior to the rights of the transferee. In an action under § 60 (the fifth cause of action) it is the date when the transfer became

so far perfected that no subsequent liens upon such property could become superior to the right of the transferee, and such a lien could not become superior through any act subsequent to the obtaining of such a lien which requires further judicial action or ruling (§ 60(a)). There is no provision in the Bankruptcy Act which fixes such date with respect to actions under § 70(e).

Both sides agree that the aforementioned events are determined by California law. The California law is explicit as to when such transfer or lien takes place and is perfected. § 1049 of its Code of Civil Procedure states:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

The cases under that section are uniform in holding that, until such final determination, the rights of the parties to the property, the subject matter of the action, remain in status quo. Nothing in the record of a trial, the judgment of a trial court, even statutes of limitations based on rights flowing from a judgment, are available until the action is passed upon by the appellate courts or unless the time for appeal has passed.

Collins v. *Ramish*, 182 Cal. 360, 188 P. 550 (1920);
Turner v. *Donovan*, 52 C. A. 2d 236, 126 P. 2d 187 (1942);
Pacific Gas & Electric Co. v. *Nakano*, 12 C. 2d 711, 87 P. 2d 700, 702 (1939);
Feeney v. *Hinckley*, 134 Cal. 467, 66 P. 580 (1901).

In *Gilmore* v. *American Central Insurance Co.*, 65 Cal. 63 (1884) the California Supreme Court said as to § 1049 on page 66:

> "While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and *until litigation on the*

merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties • • •".

Foley, in bringing his action for a declaratory judgment, never questioned his liability to the bankrupt for the 25% share in the proceeds of the sale of the Lease and Purchase Agreement. The California court, after trying the phase of the action dealing with validity of Foley's sale to Kaiser, entered an order on February 16, 1948, which stated:

> "• • • It is further declared that plaintiff, E. T. Foley is holding in trust $273,418.82, payable to the defendant, Riverside Iron and Steel Corporation, subject to the other claims of this action." (Exhibit A-2, p. 430; Vol. I, p. 68.)

When that court completed the remaining phases of the action, namely the claim of Vinnell and Dunton and that of West and Long, it entered its judgment on July 30, 1948, in which it said, among other things:

> "That the plaintiff, E. T. Foley, within ten days after the date of entry of this judgment, shall deposit with the Clerk of this Court the sum of $329,263.46 for disbursement as herein provided". (Vol. II, p. 536.)

Realizing that an action is deemed pending until passed on by the highest court, or on one's abandonment of appellate rights, the Court directed:

> "That upon the date *when this judgment shall have become final* in the Court in which this proceeding shall be finally decided, *the Clerk* of said Court, forthwith and without further order of this Court *shall distribute and pay* said sum of $329,263.46 to the parties to this action now to be named • • •." (Vol. II, p. 536.)

The California Court also determined:

> "That execution shall not issue from the whole or any portion of this judgment unless the plaintiff (Foley) shall fail to pay to the Clerk the funds herein required of him to be paid, or unless the Clerk should fail to disburse the funds as herein required." (Vol. II, p. 536.)

The text shows that it was not a final judgment. Foley deposited the money with the Clerk of the Court on August 2, 1948. No execution was issued. Riverside appealed against Foley and Kaiser because it questioned the Superior Court's determination relative to the validity of the sale. Bradt appealed from the determination of his claim against West and Long because he contended that they had released their interest in Riverside to him. Both appeals were actively pursued. The California Supreme Court completed the appellate process on November 16, 1950, and the remittitur was duly filed with the Clerk of the Superior Court on November 20, 1950. Petitioner contends that this last date is the determining one under California law when the rights of the parties to the fund were fixed.

Sharon v. *Hill*, 26 Fed. 337 (1885), decided by the United States Circuit Court for the District of California, which is the leading case on the meaning of California C. C. P. § 1049 and has been continuously followed, states on pages 346 and 347:

> " • • • . But the law of California on this subject is the law by which this Court must be governed • • • .
>
> " • • • . By section 946 of the Code of Civil Procedure, it is provided that an appeal 'stays all further proceedings in the court below on the judgment—appealed from'. This, in effect makes the appeal, like a writ of error, a supersedeas, and prevents the enforcement of the judgment by execution, pending the appeal, but nothing more. But section 1049 of the Code goes further, and provides: 'An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until after the time for an appeal has passed, unless the judgment is sooner satisfied.' The effect of this provision appears to be that the judgment in the court below is only a step in the proceeding to a final judgment in the appellate court in a case of an appeal, and otherwise to hold it in suspense as a ground of action or defense in another suit, until the time for taking an appeal has passed.
>
> "But these provisions of the code are merely the codification of the law as declared by the supreme

> court of the state under the old practice act, according to which an appeal from a judgment not only stays its execution, but suspends its operation for all purposes."

No one questions that once the money was deposited with the Clerk of the Court it was in *custodia legis*, and that no one, from that date until a final disposition of the appeal, could acquire any interest in the fund, by execution, garnishment, or any other type of lien. The fund held by the Clerk of the Court in *custodia legis* could be reached only after the judgment became final.

> *Dunsmoor* v. *Furstenfeldt*, 88 Cal. 522, 26 Pac. 518 (1891);
>
> *Credit Bureau of San Diego* v. *Getty*, 142 P. 2d 105 (1943);
>
> *City of Los Angeles* v. *Knapp*, 22 Cal. App. 2d 211, 70 P. 2d 643 (1937).

The filing of the remittitur was the last step toward such finality. The defendants-respondents could issue execution against the Clerk of the Court only after November 20, 1950, if he did not turn over to them the amounts awarded them. The bankrupt filed its petition in bankruptcy on March 14, 1941. The final determination by the California Supreme Court, the filing of the remittitur, and receipt of the funds by the defendant are within four months (the fifth cause of action), one year (the first cause of action), and three or more years (for remaining causes of action) of the filing of the petition in bankruptcy.

That Riverside and Bradt may have unjustifiably appealed from the Superior's Court's judgment, as alluded to by the courts below, has nothing to do in determining the key date, particularly since the trustee is enforcing the rights of Riverside's creditors. The action by the lower courts in concluding that the transfer or conveyance took place on August 2, 1948, cannot be supported by the facts or the law, and conflicts with the law of the State of California. This issue requires review by this Court.

POINT IV

In stating that two-thirds of the proceeds of the sale of bankrupt's sole asset belonged to the defendants-respondents, the entrepreneurs, the Court of Appeals disagreed with the District Court, and has approved of a method for permitting the promoters of a corporate venture to siphon off profits before payment to corporate creditors.

The District Court had no difficulty in concluding that the Iron Chief Lease and Sale Agreement (the asset which ultimately produced the disputed $159,000) was the property of the bankrupt corporation, both legally and equitably (Vol. I, p. 99), and that it did not hold same in any trustee capacity for the three individuals (defendants-respondents and Bradt) (Vol. I, p. 99). In an elaborate footnote (Vol. I, pp. 195-198), the District Court Judge recited the plethora of evidence showing the completeness of the corporate ownership, and that defendants-respondents wanted it that way and held it out to the public that way.

The District Court also held that there was no issue in the California court as to whether the moneys belonged to the corporation and its creditors, or to its promoters, and that the judgment there was not a bar to the maintenance by the trustee in bankruptcy of the various causes of action in the case at bar (Vol. I, pp. 100-101, 206-209).

In their brief to the Court of Appeals, defendants-respondents stated merely that they weren't waiving the question of title, but wouldn't argue it. As to their defenses of *res judicata* and collateral estoppel by judgment, which they had urged before the District Court, they didn't even make that reservation, and seemed to have abandoned them altogether.

The opinion of Judge Galston in the Court of Appeals did not expressly overrule the District Court's holdings in these respects, but in a very confused and unclear manner

seems to decide that the proceeds of the sale of the Lease and Sale Agreement belonged to the three entrepreneurs (Bradt and the defendants-respondents). This not only was contrary to the District Court's conclusions and the overwhelming proof in the record but also was contrary to a recent decision in the California Superior Court in the *Ostly* case (the decision, etc., is in the record in the case at bar [Vol. II, pp. 558-567]), where Bradt's personal creditors were excluded from participating with the corporate creditors in the other one-third of the proceeds.

It was clear to the District Court that the proceeds were corporate property; however, the District Court concluded that defendants-respondents were in the nature of contract creditors of the corporation under the basic agreement of March 14, 1941, and that when they received the $159,000; there was "fair consideration". The Court of Appeals erroneously stated that the agreement of March 14, 1941, among the corporation and its promoters, excluded the corporation from any legal right to the profits of the venture. The end result is the same. It permits two of the three entrepreneurs, or risk takers, to receive two-thirds of the proceds of the sale of the corporation's only asset while the corporation's general creditors will receive nothing.

The defendants-respondents and Bradt caused the Iron Chief Lease and Sale contract to be assigned to the bankrupt corporation in 1941 with the purpose of promoting the venture via the corporation. They entered into the basic letter agreement of March 14, 1941, to outline their individual interests in the corporate venture. This Court should consider whether the risk takers, or promoters, of a corporate venture, may acquire rights equal or superior to general creditors of the corporation.

In a very recent decision of the New York Court of Appeals, *Norman J. Weissman et al* v. *Aucnair Corporation of America*, 3 N. Y. 2d 444 (1957), 165 N. Y. S. 2d 745, the Court stated at page 449:

"• • • a joint venture may not be carried on by individuals *through* a corporate form. • • • When parties adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners *inter sese* and a corporation to the rest of the world • • • ." (underscoring in original text).

Many courts have treated persons in the position of defendants-respondents as equitable stockholders, inasmuch as the March 14, 1941, letter agreement provided for their ultimately receiving shares of stock on a par with Bradt.

Citizens Nat. Bank v. *Comm'r*, 122 F. 2d 1011, 1014 (C. C. A. 8th, 1941);

Hoyt v. *First Nat. Bank of Stillwater*, 182 Okla. 350, 77 P. 2d 538 (1938);

Steber v. *Combs*, 5 S. E. 2d 420 (W. Va., 1939); 20 Corpus Juris, p. 1303.

See:

Palcar Real Estate Co. v. *Com'r*, 131 F. 2d 210 (C. C. A. 8th, 1942);

Geist v. *Prudence Realization Corp.*, 122 F. 2d 503, 507 (C. C. A. 2nd, 1941);

U. S. v. *Certain Lands*, 44 F. Supp. 830, 831 (E. D. N. Y., 1942).

In the case at bar, District Court Judge Weinfeld, in denying the motion of defendants-respondents for summary judgment (121 F. Supp. 65, 67, 68), stated:

"All these matters raise the question whether the corporation in fact owned the mine, and the individuals • • • were equitable stockholders of the corporation or merely owned a participating interest in the mine • • •.

"It is fairly clear that the [California] court did not distribute shares of stock to West and Long only because of the awards of money made to them. *Accordingly the full record may support a claim, tenable from the present papers, that these payments constituted in effect liquidating dividends* • • •."

It is not necessary to label the interests of defendants-respondents as "equitable stockholder", or even as "contract creditor" (as did the District Court). The issue is the fundamental one of whether general creditors or risk-takers are entitled to receive first payment. As is stated in a note in 28 Columbia Law Review, pages 65 et seq.:

> "The problem is never merely one of definition, and the inquiry made should not be directed at discovering which of two labels best fits the instrument with a view to imposing all the legal consequences generally associated with a particular label. Rather should attention be focused upon the terms of the instrument and the relative equities in the position of the parties concerned in the particular dispute which has arisen * * *."

The problem has arisen in the Circuits and in many District Courts in various forms; and the general creditors' prior rights were upheld:

See:

Re Hicks-Fuller Co. (*Bolton* v. *Britton*), 9 F. 2d 492 (C. C. A., 8th, 1925);

Re Lathrap (*Lamberton et al.* v. *Langhorn*), 61 F. 2d 37 (C. C. A., 9th, 1932);

United States & Mexican Oil Co. v. *Keystone Auto Gas & Oil Service Co.*, 19 F. 2d 624 (W. D., Pa., 1924);

Re Hawkeye Oil Co., 19 F. 2d 151 (Del., 1927);

Keith v. *Kilmer*, 261 F. 733 (C. C. A., 1st, 1919, 1920).

This is the basic issue tendered by the "Sixth" and "Seventh" causes of action, and is a material issue in the "First" and "Second" causes of action.

The District Court Judge understood the issue presented, but concluded that defendants-respondents could assert the rights of "contract creditors" of their own cor-

poration. The Court of Appeals was confused and did not understand the issue. It is one that this Court should review.

The judgment below should be reversed in all respects and judgment should be granted to petitioner.

Respectfully submitted,

I. ARNOLD ROSS,
Counsel for Petitioner.

I. ARNOLD ROSS,
STANLEY J. MAYER,
of Counsel.

APPENDIX TO PETITIONER'S BRIEF

(Opinion of the United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26—October Term, 1958

(Argued November 7, 1958 Decided February 4, 1959)

Docket No. 25054

LEWIS H. SAPER, succeeded by MICHAEL BERMAN, as Trustee in Bankruptcy of the Estate of Riverside Iron and Steel Corporation, Bankrupt,

Appellant,

against

HEWITT S. WEST, JR., and the FIRST NATIONAL BANK OF NEVADA, Reno, Nevada, Las Vegas Branch, as Executors of the Estate of Hewitt S. West, Deceased, and W. LUNSFORD LONG,

Appellees.

Before:

CLARK, *Chief Judge*,

WATERMAN, *Circuit Judge*, and GALSTON, *District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York in favor of defendants. William B. Herlands, Judge. Affirmed.

I. Arnold Ross, New York City (I. Arnold Ross and Stanley J. Mayer, of counsel) for Appellant.

Shearman & Sterling & Wright, New York City (Hugh W. Darling and M. Van Voorhies, of counsel), for Appellees.

Galston, *District Judge*:

This is an appeal by the trustee in bankruptcy of Riverside Iron and Steel Corporation, a Nevada corporation, from a judgment of the District Court which dismissed appellant's complaint on the merits.

The trustee in bankruptcy seeks to recover, except as to the sums of $5,000 to Long and $2,500 to West (to cover certain expenses) funds distributed to those defendants on November 21, 1950 by the clerk of a California court, pursuant to the judgment of that court. The plaintiff alleges that such payments to West and Long were fraudulent and preferential, and in violation of § 67(d), 2(a); of § 70(e) and of § 60 of the Bankruptcy Act.*

This action is, therefore, something in the nature of an aftermath of the litigation in California in which the California Superior Court rendered judgment on July 28, 1948 in a trial in which E. T. Foley (hereinafter referred to as Foley) sought a declaratory judgment against the Riverside Iron and Steel Corporation (hereinafter referred to as Riverside), Harlan H. Bradt (hereinafter referred to as Bradt), the defendants Hewitt S. West (hereinafter referred to as West, W. Lunsford Long (hereinafter referred to as Long) and others. The California action was brought to resolve conflicting claims made by the defendants to certain funds held by Foley. These funds were the pro-

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* For ready reference there is appended to this opinion parts of the Bankruptcy Act sections referred to (Exhibit A).

ceeds of the sale by Foley to the Kaiser Co., Inc. of a certain lease with an option to purchase the Iron Chief iron mine in the County of Riverside and State of California.

Plaintiff, however, meets with considerable difficulty in that the defendants contend that the payments made to them pursuant to the California judgment in no way, as alleged, constitute a preference whether by transfer or other form of conveyance of funds of the bankrupt. The defendants also contend that the payments made to them pursuant to the California judgment were not fraudulent as the plaintiff alleges. The defendants contend also that Riverside was not bankrupt or insolvent at the time of the California judgment nor at the time the payments were made. Moreover, they contend that the payments made to the defendants were not moneys of the bankrupt.

The District Court's findings of fact cover a long range of time, beginning in 1936, and continuing to and including December 12, 1955. Because the involved underlying facts in this case have been so admirably presented in the lengthy opinion below, we mention them here only as it becomes essential to do so in our discussion of the several claims of error advanced by appellants. In part they disclose that Iron Chief was a valuable body of iron ore; that prior to April 24, 1940 Bradt negotiated with the Southern Pacific Land Company, the owner of the Iron Chief property, for a lease to the Bralowe Corporation. Bradt, West and Long were the stockholders of Bralowe and controlled the corporation. Bradt had consulted West and Long and sought to have the lease executed in favor of Bralowe, even though Bralowe were unable to carry the venture through. Bradt's belief was that the identification of the lease with that corporation could be capitalized to the joint advantage of Bradt, West and Long.

The Land Commissioner of the Southern Pacific Land Company had advised Bradt that a proposed lease in the name of Bralowe had been approved by the directors of the Southern Pacific Land Company. The Land Commissioner

assured Bralowe that if the lease went through in the name of Bralowe, Southern Pacific would approve assignment of the Iron Chief lease to a company Bralowe would form.

West and Long were informed of this proposed plan. In this entire negotiation among Bradt, West and Long it clearly appears that Bralowe was acting simply as a medium to facilitate transfer. In April 1940, Long became interested with Bradt in the Iron Chief lease and sale agreement on a fifty-fifty basis, and later in the year West also became interested on an equal basis with Bradt and Long. Controversy followed between Bradt on the one hand and West and Long on the other as to how the development of the Iron Chief and a certain manganese mining claim, designated as The Three Kids, was to be financed. Finally, after months of discussion and dispute, a settlement agreement was entered into by West, Long and Bradt. Bradt organized Riverside on March 1, 1941, which corporation was to accept the assignment and assume all of the obligations under the lease agreement.

The settlement was in the form of a letter dated March 14, 1941, signed by Bradt individually and also by him as president of the Clark-Mead Corporation and the Riverside Iron and Steel Corporation, and subjoined to the letter is an acceptance by West and Long. But in effect, though the corporations were signers to the agreement, there can be no doubt that Bradt, as sole stockholder, was acting individually with West and Long; for example the letter recites in part:

> "You are each to have the same interest or share as I myself retain either in stock or royalties or shares or profits . . .
>
> "Any interest other than compensation for my services as manager or operator is to be divided equally between us; i.e. one-third to each of us."

Since all the profits were thus arranged for, there remained nothing for Riverside by way of profits. Bradt writes also in his letter:

"I am executing this letter not only personally, but as president of both the above-mentioned corporations to the end that you may have a written record that the two corporations are charged with notice of the contents hereof."

The corporation had been organized on March 1, 1941. The validity of the agreement has at no time been challenged. So far as the record discloses Riverside had no creditors at that time.

It is important to understand that there was no direct relationship at any time between Riverside and the defendants in this action. After the March 14, 1941 agreement was executed, West and Long had nothing whatever to do with Riverside. The obligation to carry on under the terms of the lease and agreement respecting Iron Chief rested solely with Bradt. It was Bradt's inability to carry out his undertaking that compelled him to negotiate with Foley. That negotiation, of course, could not foreclose the rights that Bradt and Riverside had assigned to West and Long. The issue was decided in favor of the defendants in the California action. In a long stretch of years, from 1941 to 1951, when the petition in bankruptcy was filed by Riverside, there were no contacts between Riverside and West and Long, and no contacts indeed between West and Long and any alleged creditors of Riverside.

At no time after March 14, 1941 did Riverside have any rights to any profits that might result from the sale or transfer of the Iron Chief lease and agreement. Despite that rigid limitation the successor of Riverside, the plaintiff herein, seeks to obtain just those very profits.

During the year 1942 Bradt and Riverside were unable to finance the operation of the Iron Chief mining property or to pay the minimum royalties or taxes required by the lease. Bradt, therefore, approached Foley and sought his financial assistance, and pursuant to his rights embraced within the letter or stipulation of March 14, 1941,

the Iron Chief lease and sale agreement of April 24, 1940 was later sold and assigned to Foley. At that time the agreement of March 14, 1941 was still in force and effect, as it was right up to the time of the termination of the California litigation, as stated by the trial judge in that action.

The Kaiser Company, on January 26, 1944, had purchased from the Southern Pacific Land Company the fee of the Iron Chief mine, subject to the Iron Chief lease and sale agreement. In the development of the iron mine two other parties appeared, Vinnell and Dunton, who agreed to purchase from Foley all ore for which these men could find a market.

On April 10, 1946, Foley agreed to sell to the Kaiser Company, and Kaiser agreed to buy, the Iron Chief lease and sale agreement for $1,132,811.35.

Controversy then arose because Bradt refused to recognize the claims of West and Long which they claimed stemmed from the agreement of March 14, 1941. Bradt, on July 1, 1946, also challenged Foley's authority to make the sale to Kaiser. Therefore, on October 25, 1946, Foley commenced the action in the Superior Court of the State of California, herein referred to as the California action. That action was concluded on April 29, 1948. So far as West and Long were concerned it was adjudged that out of the proceeds of the sale of the Iron Chief lease and sale agreement West was entitled to $76,898.48, and Long to $81,898.48. Judgment was entered in that California action on July 28, 1948. It was amended on September 24, 1948 by an order which provided that Foley, within ten days after the entry of the judgment, was to deposit with the clerk of the court the proceeds of the sale for distribution in accordance with the judgment of the court, and the order further provided:

> "that execution shall not issue from the whole or any portion of this judgment unless the plaintiff

should fail to pay to the clerk the funds herein required of him to be paid, or unless the clerk should fail to disburse said funds as herein required."

Foley did deposit, on August 2, 1948, with the Clerk of the California court the full amount which he was ordered to deposit. Bradt and Riverside moved for a new trial. This motion was denied by the trial judge on September 24, 1948, and it may be emphasized that one of the reasons for the denial, as stated from the bench orally, was that the court disbelieved Bradt's testimony to the effect that the March 14, 1941 letter had been orally abandoned by West and Long.

Riverside and Bradt appealed. The District Court of Appeals for the Second Appellate District of the State of California affirmed the judgment of the trial court in all respects on September 18, 1950 and a re-hearing was denied by that court.

It may be remarked that during the California trial the trial judge heard extensive argument by counsel for all the parties with respect to all phases of the numerous issues presented by the pleadings (see Judge Herland's finding No. 59).

Riverside and Bradt persisted in their efforts to reverse the trial court and filed a petition for a hearing by the Supreme Court of California. On November 16, 1950 that court denied Riverside's and Bradt's petition for a hearing. Thereafter, on November 21, 1950, the clerk of the Superior Court paid West and Lang the sums ordered to be paid to them. On March 14, 1951, six days short of four months after the aforesaid funds had been distributed to West and Long, Bradt on behalf of Riverside filed what one could easily infer to be a devious maneuver by Bradt, a voluntary petition in bankruptcy for Riverside, not in California nor in Nevada, the home state, but in the United States District Court for the Southern District of New York.

The conclusion seems inescapable that the plaintiff here must fail. The transfer or conveyance which resulted from the California action occurred at the latest when the money was deposited in court by Foley on August 2, 1948. No party to the action, nor any other party, ever sought execution against the funds or any part thereof so deposited on August 2, 1948. Judge Herlands was clearly correct in holding that such transfer or conveyance as occurred as a result of the California action was effected at the latest when the money was deposited by Foley on that date. Certainly whether or not West or Long could have had execution on that sum on that date, no third party purchaser, lienor or creditor could have subsequently acquired greater rights than West and Long to that money.

It must be emphasized that on and after August 2, 1948, when Foley deposited the sums awarded to West and Long pursuant to the judgment of the California trial court with the clerk of the court, Riverside's only possible interest in those funds, according to Judge Herlands, was contingent upon the "highly remote possibility that the trial court's judgment would be reversed on appeal". On and after August 2, 1948 there was no possible way in which Riverside could transfer these funds to a third party so as to cut off the rights of West and Long until or unless that judgment were reversed. Under California law no creditor could have obtained a lien on the fund "in custodia legis" Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518; Credit Bureau of San Diego v. Getly, 142 Pac. 2d 105.

Basic to the trustee's recovery on any and all of the claims involved here is appellant's contention that Riverside was insolvent on the key date—August 2, 1948. On this point there is a complete failure of proof. The District Court seems correct in ruling that all of appellant's proof (sworn claims filed in the Riverside bankruptcy proceeding, Riverside's schedules as listed therein and certain judgments against Riverside on claims of uncertain origin) was hearsay and inadmissible as against these defendants. In

the convincing discussion by Judge Herlands he cites as supporting his view Bookman v. Stegman, 105 N. Y. 621, 5 Wigmore on Evidence (3rd ed. 1940), § 1377; and Richardson on Evidence, § 204, at p. 184. Judge Herlands concludes that the schedules in bankruptcy of Riverside are inadmissible to prove the insolvency of Riverside as against West and Long, and considering the context in which they are offered and the purpose for which they are offered they do not come within any of the recognized exceptions to the hearsay rule, citing 5 Remington on Bankruptcy, § 2274; Taylor v. Nichols, 134 App. Div. 787; Rosenbluh v. Kursch, 248 App. Div. 504, and In re Weissman, 19 F. 2d 769.

Judge Herlands also establishes that the full faith and credit clause of the Constitution does not require this court to hold that the nine judgments set forth in Exhibit B, conclusively establish the veracity of the allegations in the complaint initiating the actions resulting in these judgments as against West and Long since they were never parties to those actions, Gratiot State Bank v. Johnson, 249 U. S. 246. Judge Herlands notes that the judgments, especially the six default judgments, are not admissible in evidence insofar as they were introduced for the purpose of establishing the facts alleged in the complaint upon which the judgments were granted. See Cromwell v. County of Sac., 94 U. S. 351.

The First "cause of action" seeks to recover the funds distributed to defendants (except as to the sum of $5,000 to Long and $2,500 to West) by the clerk of the California court on November 21, 1950, pursuant to the judgment of the California court on the alleged ground that such distribution constituted a "fraudulent transfer" of the property of the bankrupt while the bankrupt was insolvent, or which rendered Riverside insolvent, made without a fair consideration within one year of the filing of Riverside's petition in bankruptcy on March 14, 1951 in alleged violation of § 67(d) 2(a) of the Bankruptcy Act. These payments, according to Judge Herlands, did not constitute a

transfer "made * * * by a debtor" within the meaning of § 67(d) 2(a) of the Bankruptcy Act. The alleged transfer of said funds was not made by the bankrupt but by the judgment of the California court and over the strenuous opposition of the bankrupt. He also found that the alleged transfer of said funds was perfected more than a year prior to the filing by Riverside of its petition in Bankruptcy on March 14, 1951.

The Second cause of action seeks to recover the distribution of the aforesaid funds made to the defendants by the clerk of the California court on November 21, 1950 as a "conveyance" by Riverside without a fair consideration made while Riverside was insolvent or which rendered it insolvent, and alleged to be fraudulent as to a creditor or creditors of Riverside who have a claim or claims provable in bankruptcy because of such "conveyance" and in violation of § 3439.04 of the California Civil Code, the remedy for the violation thereof being made available to the plaintiff-trustee under § 70(e) of the Bankruptcy Act. The controlling date, as was stated supra, is August 2, 1948. Section 70(e) would void the "conveyance" only in the event that it was fraudulent as against creditors of the bankrupt. It should be emphasized that there is no proof that on the critical or key date, August 2, 1948, the judgment of the California court was in any respect fraudulent. Nor is there proof that Riverside was insolvent at that time.

The Third and Fourth causes of action of the complaint were voluntarily withdrawn during the trial by counsel for the plaintiff for failure of proof.

The Fifth cause of action alleges that the distribution of these funds constituted a "transfer" of the property of Riverside made or suffered by Riverside for the benefit of a creditor of Riverside for or on account of an antecedent debt while Riverside was insolvent and within four months of the filing of Riverside's petition in bankruptcy on March 14, 1951 on the alleged ground that it enabled the defendants, who had reasonable cause to believe Riverside

was insolvent, to obtain at the time the transfer was made a greater percentage of their debt than other creditors of the same class, and that the transfer constitutes a preference under § 60 of the Bankruptcy Act. Judge Herlands found that essential elements of this cause of action were not substantiated, and we agree.

The Sixth and Seventh causes of action might perhaps be best disposed of when considered together. The Sixth cause alleges that the distribution of the funds on November 21, 1950 constituted a distribution of assets of Riverside to defendants as stockholders of Riverside in disregard of the rights of creditors of Riverside, and is void as to such creditors as a matter of law under § 45 of the Nevada Domestic Corporation Act, and such funds may be recovered by Riverside's bankruptcy trustee under § 70(e) of the Bankruptcy Act. The Seventh cause of action alleges that under the March 14, 1941 agreement the defendants appointed Bradt their agent to administer, operate and sell their property right in the lease and option agreement, and Bradt in his own behalf and in such representative capacity incurred debts and obligations totaling about $210,000 either in Riverside's name or in the name of Riverside and Bradt. The action alleges that the defendants permitted legal title to said lease and option agreement to be placed in the name of Riverside, and that defendant knew or should have known that Bradt and Riverside were incurring said debts upon the representation made to the creditors that Riverside was the owner of said lease and option agreement. The Seventh cause of action also alleges that the distribution to the defendants by the California court on November 21, 1950 is impressed with a trust for the benefit of said creditors of Riverside, and that defendants held so much of said funds in trust for said creditors to the extent of defendants' respective one-third share of said debts, and that the plaintiff can recover said trust funds for the benefit of said creditors of Riverside.

These last two causes of action are both unsound. First it may be observed that the several claims contained in these

causes of action cannot be advanced on behalf of creditors who became such after August 2, 1948, when Foley paid the money in court; and moreover on that date Riverside does not appear to have been insolvent. On August 2, 1948 (supra) Riverside had assets of $82,619, its recovery out of the California action. Its liabilities—omitting claims of lesser equity than West's and Long's—were at most $44,095.58, as set forth in Exhibit B. Judge Herlands found, and the finding is sound, that there is no competent proof as against West and Long of the amount of the assets or liabilities of Riverside on August 2, 1948, or indeed on November 21, 1950, or of its insolvency at any of such times. Nor is there proof that either of the defendants should be charged with knowledge of its insolvency then or at any time prior to the filing of Riverside's petition in bankruptcy.

None of the causes of action in the complaint has been sustained by the plaintiff.

The judgment of the District Court dismissing the complaint is affirmed.

(Exhibit A)

§ 67(d)

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; • • •

§ 70(e)

(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable

under this title, shall be null and void as against the trustee of such debtor.

* * *

§ 60

(a) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter 10, 11, 12 or 13 of this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bonafide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter 10, 11, 12 or 13 of this title, it shall be deemed to have been made immediately before bankruptcy.

(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value; Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a pref-

erence by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

* * *

(EXHIBIT B)

Riverside's liabilities on August 2, 1948

A.	Judgments:	
	Carnrick (default judgment on promissory notes)	$14,673.18
	Ward (same)	14,707.00
	Martin (for services, litigated)	986.00
	Wood (unspecified, litigated)	4,012.90
	Kuttnauer (default judgment for legal services)	1,500.00
B.	Sworn claims filed against Riverside:	
	N. Y. State License fee	unliquidated
	Carhahan (accounting services 7/11/42-3/13/48 balance due)	1,050.00
	Landels & Weigel (legal services re Riverside-Foley contract negotiations)	262.02
	Alley (legal services re Riverside-RFC dealings in 1942)	501.50
	Brumley (judgment for an unspecified obligation)	3,682.98
	W. L. Paulson (loans to Riverside)	2,720.00
	Total	$44,095.58

The Brumley and Paulson obligations were listed in Bradt's individual bankruptcy schedules, and were also on

Ex. B-98, which was discredited in the California action. The Carnrick and Ward notes were given after the California action was commenced, and apparently to finance Bradt's and Riverside's defense.

The above list does not include any of the items listed in subdivision C of Schedule VI, which total $45,900.00, since these items are supported only by Bradt's own assertion.

The following judgments are also excluded: C. L. Clark, as assignee of McGuire and Fenston, $42,263.62 (McGuire and Fenston seem to have been co-venturers with Bradt. The court below found that McGuire's notes, particularly, were issued only for tax purposes and were to be paid only out of Bradt's profits, see Finding 130, Rec. p. 96); United States Pipe & Foundry Co., $13,194.36 (the underlying obligation was Bradt's personal one; default judgment was recovered against Riverside on the theory that it was Bradt's "alter ego").

Of the sworn claims filed in the Riverside bankruptcy proceeding the following are not included: Hammack & Hammack, $10,570.00 (legal services seemingly in relation to the California action); Hotchkiss, $3,250.00 (expert witness in that action); and Harlan H. Bradt, Jr., $4,125.00 (apparently the son of the "Bradt" referred to herein).

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 878

MICHAEL BERMAN, successor to LEWIS H. SAFER, as Trustee in Bankruptcy of the Estate of Riverside Iron and Steel Corporation, Bankrupt,

Plaintiff-Petitioner,

—against—

HEWITT S. WEST, JR., and THE FIRST NATIONAL BANK OF NEVADA, Reno, Nevada, Las Vegas Branch, as Executors of the Estate of Hewitt S. West, Deceased, and W. LUNSFORD LONG,

Defendants-Respondents.

BRIEF OPPOSING CERTIORARI

JOHN A. WILSON
Counsel for Respondents
20 Exchange Place
New York 5, New York

HUGH W. DARLING
M. VAN VOORHIES
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1958.

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—against—

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Defendants-Respondents.

BRIEF OPPOSING CERTIORARI

Statement

Petitioner's application for a writ of certiorari is the last step in an extended litigation, commenced October 25, 1946, when action was first brought in the California state court to determine the respective rights of the parties under a letter agreement, dated March 14, 1941 (A. 16-21),* made between Riverside and Bradt, its president, on the one hand, and West and Long on the other (Pet. Appdx. A, pp. 32-33). This agreement related to the exploitation of an iron

* References are to pages of petitioner's Appendix in the Court of Appeals.

mining property in the State of California, called the Iron Chief, subsequently purchased and developed by Henry J. Kaiser.

Throughout twelve years of extensive litigation, the petitioner, or his predecessors in interest, the trustee, Saper, and Riverside Iron & Steel Corporation, and its president, Harlan H. Bradt, have been defeated uniformly *on the facts.*

District Judge Herlands in a carefully prepared opinion of 228 pages (A. 36-265) found below that each of the claims alleged in the seven counts of petitioner's complaint was not established *by the facts,* contrary to petitioner's contentions. He was unanimously affirmed by the Court of Appeals, Second Circuit, which in its opinion (See Pet. Appdx. A, pp. 29-40, *Saper* v. *West,* 263 F. 2d 442 (2 Cir. 1959), Advance Sheets No. 3, April 6, 1959) found that Judge Herlands had correctly determined that petitioner had failed to establish facts sufficient to support any of the claims asserted. The Court of Appeals also denied petitioner's petition for a rehearing (Pet. p. 2).

It would be difficult to present to this Court for review a case more thoroughly litigated and decided below on the facts. And we respectfully submit that the petition for certiorari should be denied since the case obviously presents no question meriting review.

The Facts

Petitioner, the Trustee in Bankruptcy of Riverside Iron & Steel Corporation, a Nevada corporation, seeks to recover herein, pursuant to *Section 60* [11 U. S. C. §96], *Section 67(d)(2)* [11 U. S. C. §1[illegible]d)] and

Section 70(e) [11 U. S. C. §110(e)] of the Bankruptcy Act. Recovery is sought of $76,898.48 from West and $81,898.48 from Long, the amounts awarded and paid to respondents under the letter agreement of March 14, 1941 (*supra*, p. 1) pursuant to a judgment of the California Superior Court, Los Angeles County, which fixed respondents' respective rights and interests under that agreement.

That judgment was entered on July 28, 1948 (A. 71-72), in an interpleader action, wherein the alleged bankrupt, Riverside, and the respondents, were opposing parties.

The California action was an interpleader action commenced to fix the rights of the respective parties in and to the proceeds of the sale of the Iron Chief mine to Kaiser, brought by one E. T. Foley, against Riverside and Bradt, its president, and the present respondents, West and Long, among others.

In that action the California trial court held by its judgment of July 28, 1948 (A. 37, 70-71), as slightly modified on September 24, 1948 (A. 72), that West and Long were entitled to receive $76,898.48 and $81,898.48, respectively, out of the proceeds of said sale by Foley to Kaiser.

The judgment directed Foley to deposit said sums with the Clerk of the court, to be paid by the Clerk to West and Long "forthwith and without further order of this Court", when "this judgment shall have become final in the court in which this proceeding shall be finally decided" (A. 71-72).

Foley deposited the funds with the Clerk, as directed by the California judgment, *on August 2, 1948* (A. 72). The stenographic record on that California trial consisted of more than 2800 pages of evidence (A. 192, fn. 81)* and many documentary exhibits, all of which testimony and exhibits were introduced into evidence upon the trial of the present action.

After appeals by Riverside and Bradt to the highest California court, the judgment of the California trial court was in all respects affirmed on November 16, 1950 (A. 79, 81). Upon remittitur, the Clerk of the Superior Court, Los Angeles County, on November 21, 1950, without further order, distributed to counsel for West and Long the sums of $76,898.48 and $81,898.48, respectively, awarded to them by the judgment of July 28, 1948 (A. 81) and as directed in that judgment (A. 71-72).

On March 14, 1951, just six days short of *four months* after the aforesaid funds had been distributed to West and Long, Bradt filed a *voluntary* petition in bankruptcy for Riverside, not in California nor in Nevada, the home state, but in the United States District Court for the Southern District of New York. On the same day, Riverside was adjudicated bankrupt (A. 81, fnd. 79).

Bradt's obvious purpose, which the Court of Appeals characterized as a "devious maneuver" (Pet. Appdx. A, p. 35) was to undo, if possible, the award made to West and Long by the judgment of the Cali-

* Footnotes to the District Court's opinion are designated "fn.", with the appropriate numbers. Findings by the District Court are designated "fnd." or "fnds.", with the appropriate number or numbers.

fornia court: because Bradt listed himself and members of his family as large creditors of Riverside and he included, also, as creditors, his friends, associates and attorneys (A. 260-264, Appdx. A, District Court Opinion). Bradt obviously thought that, through bankruptcy, he might retrieve from West and Long, for himself and associates, at least a substantial portion of the amounts awarded to West and Long under the 1948 judgment of the California court.

It is the above sums, paid to respondents pursuant to the California judgment, that the petitioner, as alleged trustee in bankruptcy of the alleged bankrupt, Riverside, seeks to recover in this action, upon the ground that such payments, directed by the 1948 judgment of the California court, constitute fraudulent transfers or preferential payments.

POINT I

The petition ignores all facts found by the District Court and affirmed by the Court of Appeals, Second Circuit—and, in particular, it ignores petitioner's failure to establish the existence of unsatisfied general creditors.

The petition for certiorari completely ignores all the pertinent facts of this case, as found and established by the 228 page opinion of the District Court, affirmed on all points by the Court of Appeals, Second Circuit.

To illustrate: Petitioner's entire case (Pet. p. 2) is built upon the assumption that West and Long were paid two-thirds of the proceeds of the sale of Riverside's only asset, the Iron Chief mine, "while the

general creditors of the corporation are unpaid." But that contention ignores the fact that the District Court found, as a fact, and was affirmed by the Court of Appeals, Second Circuit, that (A. 98):

> "135. It has not been established that Riverside incurred any debts in connection with the exploitation of the Iron Chief lease and sale agreement in excess of the amounts found and allowed to it in the California action. (See Defs. Exh. B-12, pp. 2903-04, 2906)."

And further (A. 99):

> "138. It has not been established that Riverside, in fact, incurred any debts or other obligations in the normal course of business in the exploitation of the Iron Chief lease and sale agreement, in excess of the amounts allowed to Riverside and Bradt in the California action."

Judge Herlands also found (A. 239):

> ". . . though the record is replete with references to creditors and indebtedness, it appears that much of this is due to debts incurred by Bradt for his personal expenses."

Indeed, the amount of the debts and other obligations *in fact incurred* by Riverside and Bradt in the exploitation of the Iron Chief lease and sale agreement, *was* an *issue litigated* between West and Long and Riverside and Bradt, in the California action (A. 32-33, fnd. 58). Judge Herlands specifically found that one of "The two major issues raised in the West-Long phase of the California litigation" was

"(2) the validity of the expenses listed in Bradt and Riverside's Exhibit B-98" (A. 208).

That issue was specifically adjudicated and determined by the judgment of the California court, and a specific sum of money was awarded and allowed to Riverside and Bradt to cover all such obligations incurred in connection with the Iron Chief mine. Thus, Judge Herlands expressly found (A. 92-93, fnd. 119):

> "119. In its judgment, the California court made an allowance of a total of $7,500 and $13,500, mentioned in the March 14, 1941 agreement (Def's Exh. A-1, pp. 161-166, at pp. 163, 164), plus an additional amount of $20,388.03, or *a total of $41,388.03 to Riverside and Bradt on account of expenses or obligations incurred in connection with or on behalf of the Iron Chief lease and sale agreement* (Def's Exh. A-2, pp. 479-480). There is no competent evidence that any additional expenses, obligations or debts were incurred by Riverside on account of or in connection with the Iron Chief lease and sale agreement". (emphasis added)

The determination by the California court that, subsequent to March 14, 1941, a total of only $20,388.03 expenses, obligations or debts, was incurred by Riverside and Bradt in connection with or on behalf of the Iron Chief lease is, as between West and Long, and Riverside (and, of course, its trustee in bankruptcy, the present appellant), a binding adjudication of *that issue* concerning the amount of the debts Riverside incurred in exploiting the Iron Chief mine. Such adjudication constitutes an estoppel by judgment *on that issue* against the petitioner. (*Cromwell v. County*

of Sac, 94 U. S. 351, 352-3 (1876); *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 91 (1954); *Commissioner* v. *Sunnen*, 333 U. S. 591, at pp. 597-598 (1948); *Saper* v. *Long*, 121 F. S. 65 (S. D. N. Y. 1954)).

It is clear that this estoppel by judgment against the bankrupt runs also against its trustee. (*Heiser* v. *Woodruff*, 327 U. S. 726, 732-733 (1946); *In re Mercury Engineering, Inc.*, 68 F. S. 376, 380 (S. D. Calif. 1946); *Pearson* v. *Rapstine*, 203 F. 2d 313 (5 Cir., 1953); *Davis* v. *Mabee*, 32 F. 2d 502 (CCA 6th, 1929); *Johnson* v. *Burke Manor Bldg. Corp.*, 48 F. 2d 1031 (CCA 7th, 1931); *Detroit Trust Co.* v. *Schantz*, 14 F. 2d 225, 226 (E. D. Mich. 1926), rehearing den'd 16 F. 2d 943).

And Judge Herlands so found (A. 105, Concl. (x)).

Consequently, *at the very outset*, petitioner's principal issue and contention is clearly barred by the estoppel of the California judgment, namely: his contention that Riverside had outstanding large unsatisfied claims of *bona fide* general creditors, which Riverside incurred in the exploitation of the Iron Chief mine and which should be satisfied out of the alleged "profits" from the sale of the mine, but that such profits, instead, were distributed to the defendants-respondents in disregard of the rights and claims of general creditors.

The California judgment finally determined the amount of the debts Riverside had incurred in connection with the Iron Chief mine, and made an allowance to Riverside therefor. Petitioner is precluded, therefore, by that judgment from attempting to claim or

prove that Riverside had other creditors at that time, even if that were true, which it is not.

This destroys the very cornerstone of petitioner's entire case. Because, absent general creditors of Riverside with claims exceeding the amount awarded to Riverside by the California judgment, there is no basis upon which its bankruptcy trustee could claim that the amounts paid to West and Long were voidable preferences or fraudulent transfers, subject to being set aside under the Bankruptcy Act.

POINT II

Moreover, petitioner ignores the fact that each of his separate claims was dismissed by the Trial Judge because petitioner failed, as a matter of fact, to establish each of them on several separate grounds.

Consequently, even if the Trial Judge were mistaken as to one ground, each of petitioner's claims nevertheless must fail on the other separate grounds.

In his opinion the Trial Judge clearly summarized each "cause of action" pleaded in the complaint, and clearly and specifically stated his reasons for dismissing each of them: First Cause of Action (A. 38, A. 102-103); Second Cause of Action (A. 38, A. 102-103); Third and Fourth Causes of Action, (A. 101, Concl. 12); Fifth Cause of Action (A. 38, A. 103-104); Sixth Cause of Action (A. 39, A. 104); and Seventh Cause of Action (A. 39, A. 104-106).

The Court of Appeals in its opinion (Pet. Appdx. A, pp. 29-40) concurred with the determination of the

District Court "so admirably presented in the lengthy opinion below, . . .".

In each case, each separate cause of action was found not to have been established because of petitioner's failure to establish not one, but several separate facts, each of which was essential to the establishment of the particular cause of action upon which petitioner relied.

POINT III

Petitioner's argument with respect to the meaning of the word "transfer" as used in § 67(d)(2) of the Bankruptcy Act is unsound.

Petitioner argues (pp. 9-14) that there is no distinction between the words "transfer made . . . by a debtor" in §67(d)(2) of the Bankruptcy Act, and the words "transfer made or suffered . . . by a debtor" used in §70(e) of the Act.

In footnote 101 to his opinion (A. 211-227), Judge Herlands points out that §60 and §70(e) of the Act, which refer to the avoidance of preferences or transfers "made or suffered" by a bankrupt, include both voluntary and involuntary transfers of whatever kind.

In the same footnote, with a careful analysis of the pertinent authorities, Judge Herlands further concluded that a "transfer made . . . by a debtor" referred to in §67(d)(2) of the Act, was confined to "voluntary" transfers of the bankrupt's property.

He concluded, therefore, that petitioner's First Cause of Action, which is predicated on §67(d)(2) could not avoid the "involuntary transfer" suffered by Riverside under the judgment of the California court, which was entered over Riverside's vigorous opposition.

The Court of Appeals, in its opinion, refers to that conclusion of Judge Herlands, but points out, further, that the alleged transfers were "perfected" more than one year prior to the filing of petitioner's petition in bankruptcy (Pet. Appdx. A, pp. 37-38), and would not fall within §67(d)(2) of the Act, in any event.

This decision by the Court of Appeals, Second Circuit, conflicts in no way with the decisions made in *Eisenrod* v. *Utly*, 211 F. 2d 678 (9 Cir., 1954) and *Warner* v. *Dworsky*, 194 F. 2d 277 (8 Cir., 1952), upon which petitioner relies (pp. 13-14). Both of the latter decisions deal with entirely different factual situations, and, moreover, with §70(e) of the Bankruptcy Act, not with §67(d)(2).

Judge Herlands correctly construed the words "transfer made . . . by a debtor" in §67(d)(2) of the Act, we submit. And, his carefully reasoned conclusions are to be preferred to the off-hand statements made by the textbook writers quoted by petitioner (pp. 10-12). The statements quoted by petitioner, in some cases, do not even support what petitioner claims. Moreover, none of them is supported by any stated reason or buttressed by the citation of any authority.

POINT IV

The alleged transfers or preferences became "perfected" on August 2, 1948, nearly two years and six months prior to March 14, 1951, when Bradt filed in New York a voluntary petition in bankruptcy for Riverside.

Petitioner argued below and asserts again here (pp. 18-22), that the alleged "transfers" or "preferences" allegedly received by West and Long under the California judgment, were "perfected", within the meaning of §60 and §67(d) of the Bankruptcy Act, not on August 2, 1948, when Foley paid the funds to the Clerk of the court as directed by the California judgment, but only on November 21, 1950, when the Clerk paid over the funds to West and Long, after that judgment had been affirmed on appeal, in California.

Petitioner argues (pp. 19-20) that the date chosen by him is correct, because under California law an action is deemed "pending" until any appeals are decided. But as Judge Hemmands pointed out in footnotes 102 and 103 to his opinion (A. 227-234), the fact that the judgment did not become "final" under California law, pending appeal, does not fix the time when the alleged "preference" or "transfer" directed by the California judgment became "perfected". Under the Bankruptcy Act, a "preference" or "transfer", respectively, is "perfected" when:

> ". . . no subsequent lien upon such property obtainable by legal or equitable proceedings on a

simple contract could become superior to the rights of the transferee" (§60(a)(2) of the Act).

or when:

". . . no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein. . . ." (§67(d)(5) of the Act).

In footnotes 102, 103 and 114 to his Opinion (A. 227-234; A. 247-249), Judge Herlands effectively answers Appellant's patently unsound arguments and contentions, designed to establish that the alleged "preference" or "transfer" was not "perfected" until November 21, 1950. We respectfully refer this Court to those footnotes and to *Funk* v. *First National City Bank*, 185 Okl. 604, 95 P. 2d 589 (1939); and *In re Koslowski*, 153 F. 823 (M. D. Pa. 1907), which offer further support to Judge Herlands' conclusion.

The Court of Appeals in its opinion unqualifiedly agreed with Judge Herlands' conclusion on this point (Pet. Appdx. A, p. 36) and, indeed, we find it difficult to conceive how any contrary conclusion could be reached, within reason.

POINT V

The courts below properly concluded that petitioner had not established Riverside's insolvency against respondents at the material date, August 2, 1948.

Petitioner argues that the bankrupt's schedules in bankruptcy (prepared by Bradt), the proofs of debt, filed by various alleged creditors [none of which had been allowed by the petitioner], eight judgment rolls, and the certified copy of another judgment, establish, as against these respondents, that Riverside was insolvent.

Petitioner confuses his contentions on this point, since he claims that the documents referred to establish Riverside's insolvency *as of November 20, 1950.* However, the courts below have held, and we submit, correctly, that the material date for establishing Riverside's insolvency is *August 2, 1948* (See Point IV; *supra*, pp. 12-13).

Petitioner makes no effort to analyze for the benefit of this Court, what he contends these documents show with respect to Riverside's insolvency *on August 2, 1948.* Fortunately, the Court of Appeals, in Exhibit B to its Opinion (Pet. Appdx. A, pp. 42-43) did take the trouble to make such analysis, which clearly establishes that Riverside was not insolvent on the material date, August 2, 1948.

Even if all of the above were disregarded, we submit, further, that the alleged *prima facie* proof of insolvency upon which petitioner seeks to rely, is wholly worthless and incompetent, for several reasons.

The schedules annexed to Riverside's bankruptcy petition were objected to as proof of insolvency. Moreover, they were inherently incredible, having been prepared by Bradt on the basis of his Exhibit 98-B in the California action, which exhibit was discredited and rejected both by the California court and by the District Court upon the present trial (A. 92, fn. 118; A. 238; A. 238, fn. 70; A. 257, fn. 120).

As to Bradt's credibility, the California court (Honorable William J. Palmer) had this to say, and the District Court in New York agreed with his conclusion (A. 178, 179):

> "He [Bradt] came back here with what, without any exception, was the most preposterous effort to establish properly chargeable expenses that I have ever seen in court . . . He comes back here with an obvious effort to charge against this fund every dollar he could possibly think of as having been incurred by himself for personal expenses and every kind through the years . . . it just made this total account . . . utterly unworthy of credence . . .
>
> * * * *
>
> . . . the whole effort to commit this imposition upon the Court, an effort which was a little short of an insult to this Court's intelligence, was such that it just left the whole document without foundation and unworthy of credence."

And, further:

> "I have been too kind to Mr. Bradt in restraining comments that I might have made concerning his testimony. . . . But I will say now

> to his present counsel who may or may not repeat it to his client, as his judgment dictates, that in all my experience in the law I can only now think of two or possibly three other persons whom I have ever confronted on the witness stand who were, in my judgment and appraisal, as slippery and unreliable as Mr. Bradt. (Defendants' Exh. B-16, p. 107)."

It is established that a hearsay declaration cannot be accepted as evidence unless "made under circumstances regarded as rendering it trustworthy", *Matter of Knetzer, Bankrupt*, 243 F. 2d 460 (7 Cir., 1957) and it is properly excluded, as the Court of Appeals held in that case, where (p. 462):

> "The trial court could not have listened to all of the evidence in this case without realizing that statements made by Knetzer, sworn or unsworn, could not be relied upon."

The six cases cited by petitioner (p. 16) were all relied upon in the courts below. None of these holds that, as against third parties, insolvency can be established by the bankrupt's schedules alone. In all of them there was ample competent proof to establish the insolvency, aside from the schedules, which appear to have been received without objection and are referred to in the opinions only by passing comment.

As to the "proofs of claim" filed in Riverside's bankruptcy proceeding, they were objected to, when offered (A. 705), and were received by the Court, not

as proof of insolvency, but for a very limited purpose (A. 708):

> "The Court: For the limited purpose . . ., simply as proof of the fact that certain claims have been filed; is that correct?
>
> Mr. Ross: That is right.
>
> The Court: And nothing else.
>
> Mr. Ross: No. . . ."

Petitioner admitted that the claims filed had not been allowed (A. 707), and Judge Herlands correctly held them incompetent to establish Riverside's insolvency (A. 240; A. 90-91, fnds. 110-111).

As to the judgments against Riverside, all but two of which were by default, they do not establish Riverside's insolvency on August 2, 1948 (Findings 121-132, A. 93-97; fn. 104, A. 234-241, particularly at 241). Petitioner's reference (p. 17) to the Full Faith and Credit Clause in connection with these judgments, is without merit (*Riley* v. *New York Trust Co.*, 315 U. S. 343, (1942); *Gratiot State Bank* v. *Johnson*, 249 U. S. 246 (1919), as the Court of Appeals properly held (Pet. Appdx. A, p. 37).

POINT VI

Answering petitioner's Point IV

Petitioner presents a confused argument (pp. 23-27) to the general effect that the entrepreneurs, risk-takers, or promoters of a corporate venture, cannot acquire rights in the funds of the corporation "superior to general creditors":

While the general principle and the authorities cited by petitioner are sound, they have no application here, in view of the detailed findings of the Trial Court. For the existence of general creditors of Riverside was not proved (Point V, *supra*, pp. 14-17), and, indeed, could not have been proved (Point I, *supra*, pp. 5-9).

Moreover, as the Court of Appeals points out (Pet. Appdx. A, pp. 32-33), Riverside never had any right under the March 14, 1941 Agreement to the sums awarded respondents, West and Long, by the California judgment.

POINT VII

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
June 9, 1959

JOHN A. WILSON
Counsel for Respondents

HUGH W. DARLING
M. VAN VOORHIES
Of Counsel